1968

Trade Commission of Utah, State of Utah v. Skaggs Drug Centers, Inc., Grand Central Stores, Inc., D/B/A Warshaw's Giant Food and Grand Central Drugs, Inc. : Brief of Defendant, Skaggs Drug Centers, Inc.

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OF THE STATE OF UT

ADE COMMISSION OF UTAH,
ATE OF UTAH,
Plaintiff-Appellant,

— vs. —

AGGS DRUG CENTERS, INC.,
AND CENTRAL STORES, INC.,
/a WARSHAW'S GIANT FOOD and
AND CENTRAL DRUGS, INC.,
Defendants-Respondents,

AH RETAIL GROCERS'
SOCIATION,
Intervenor-Appellant.

BRIEF OF DEF
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IN THE SUPREME COURT OF THE STATE OF UTAH

TRADE COMMISSION OF UTAH, STATE OF UTAH,
Plaintiff-Appellant,

— vs. —

SKAGGS DRUG CENTERS, INC., GRAND CENTRAL STORES, INC., d/b/a WARSHAW'S GIANT FOOD and GRAND CENTRAL DRUGS, INC.
Defendants-Respondents,

and

UTAH RETAIL GROCERS' ASSOCIATION
Intervenor-Appellant.

Case No. 11034

BRIEF OF DEFENDANT, SKAGGS DRUG CENTERS, INC.

NATURE OF THE CASE

This is an action instituted by the Utah Trade Commission to enjoin each of the defendant-respondents from selling certain merchandise in violation of the Utah Unfair Practices Act (13-5-7, 13-5-9, Utah Code Annotated 1953, as amended). The Utah Retail Grocers' Association was permitted to intervene in the action.

DISPOSITION IN THE LOWER COURT

The case was tried to the lower court without a jury. Based upon the stipulations of the parties and the evidence adduced at trial, the court entered judgment in favor of defendants, and held the Unfair Practices Act to be unconstitutional as being in violation of the Fourteenth Amendment to the Constitution of the United States, and in violation of the Constitution of the State of Utah, Article I, Sections 1, 2, 7, 18, 23 and 24, Article VI, Section 26, and Article XII, Section 20.

RELIEF SOUGHT ON APPEAL

Defendant-Respondent, Skaggs Drug Centers, Inc., seeks affirmance of the judgment of the lower court and a declaration by the Supreme Court that the Utah Unfair Practices Act is unconstitutional.

STATEMENT OF FACTS

The following facts are those as set forth by the lower court in its findings of fact and conclusions of law.

Skaggs Drug Centers, Inc. (hereinafter called "Skaggs") and Grand Central Stores, Inc., dba Warshaw's Giant Food and Grand Central Drugs, Inc. (hereinafter called "Grand Central") are retail merchants, who offer for sale a wide variety of merchandise, each item of which has individual cost factors such as variance in consumer demand for the product, rate of turnover, cost of advertising, handling costs, including

warehousing, marketing, packaging, displaying and purchasing costs, varying depreciation sometimes depending on perishability or seasonal demand and sometimes depending on obsolescence, labor, overhead and administrative costs and trade and cash discounts some of which cannot be determined or are not known at the time the goods are priced for sale. Defendants, each using separate accounting methods, for the purpose of determining proper profit and cost guidelines for their operations, are each using sound, accepted and practical accounting procedures with as much emphasis of detail as feasible. Neither defendant attempts to accurately determine their cost for each item they sell, as to do so would be too costly and hence impractical and not feasible. Defendants cannot reasonably be required to establish accounting procedures whereby their actual cost per item sold could be determined at or prior to the sale or offering for sale of such item. (R. 42)

Plaintiff's complaint alleges that on June 23, 1966, defendants advertised "Crest Family Toothpaste" at 50¢, which is a sale below cost as defined by the Utah Unfair Practices Act, with the intent and purpose of inducing the purchase of other merchandise or unfairly diverting trade from a competitor or otherwise injuring a competitor. Since the only defense offered by the defendants to this charge was the unconstitutionality of the act, these allegations were taken to be true. (R. 37)

On June 23, 1966, the defendant, Grand Central, advertised and sold "Aqua Net Hair Spray" at 49¢, which was a sale below cost as defined in the act. On the

same date, Skaggs advertised and sold "Style Hair Spray" at 49¢, which was a sale below cost as defined by the act. "Aqua Net Hair Spray" and "Style Hair Spray" are competitive and comparable products with regard to weight, size, use, price and customer demand. The sales by Skaggs and Grand Central were made in an endeavor to meet the price of Shoppers' Discount, a competitor of defendants, which had advertised and sold "Aqua Net Hair Spray" at 49¢ on June 16, 1966. The sale by Shoppers' Discount was also a sale below cost as defined by the act. Neither defendant has any actual knowledge that the sale by Shoppers' Discount was a sale below cost as defined by the act. (R. 39) The court concluded that the sales by Grand Central and Skaggs were made by defendants in an endeavor made in good faith to meet the price of their competitor selling the same article, product or commodity, and that defendants were entitled to assume that the advertised price of Shoppers' Discount was a legal price in the absence of actual knowledge of an illegal sale by Shoppers' Discount. (R. 46)

On June 20, 1966, Skaggs advertised a carton of cigarettes for $2.73 and gave a cigarette lighter away, free, with the purchase of each carton, which cigarette lighter cost Skaggs 25¢ each. The sale of the carton of cigarettes alone was not a sale below cost as defined by the act unless the cost of the cigarettes and lighter were combined, in which case the sale would be a sale below cost as defined by the act. (R. 39) The court concluded that the transaction in question did not violate the act since the sale of the cigarettes was not a sale be-

low cost as defined by the act and the gift of the lighter was not prohibited by the act. (R. 46)

On June 16, 1966, Skaggs advertised in the Provo Daily Herald the sale of Vimanal Vitamins at 82¢ per hundred tablets, which was a sale below cost as defined by the act. Skaggs had no competitor in the Provo area with respect to this item. The sale was made by Skaggs with the intent of inducing its customers to purchase other merchandise, but was not done with the purpose of unfairly diverting trade from a competitor or otherwise injuring a competitor. (R. 39, 40) The court concluded the prohibition against the sale below cost was unconstitutional where the only intent of the retailer in pricing the item below cost was to induce the customer of the retailer to purchase other merchandise from that retailer. (R. 44, 45)

On June 23, 1966, the defendants advertised "Bayer Aspirin" at 55¢ per hundred. The sale of "Bayer Aspirin" at 55¢ by Grand Central was not a sale below cost as defined by the act, but the sale by Skaggs was a sale below cost as defined by the act, due to the different discounts given to the two defendants in connection with their purchase of the item. (R. 24, 25, 40)

On June 20, 1966, Skaggs advertised "Polaroid Swinger Cameras" at $13.49, which was a sale below cost as defined in the act, and in connection with the sale limited one camera to a customer. Section 13-5-9 (2) creates a presumption that a sale was made with the intent of injuring competitors or destroying compe-

tition where a sale is made below cost as defined in the act and there is a limitation on the quantity which can be sold to any one customer. Except for this statutory presumption, there was insufficient evidence that Skaggs offered the camera for sale with the intent of inducing the purchase of other merchandise or of unfairly diverting trade from a competitor or otherwise injuring a competitor. The court concluded that the statutory presumption of illegal intent unconstitutionally shifted the burden of proof to the defendant and arbitrarily assumes an illegal intent from unrelated facts.

ARGUMENT

Defendant, Skaggs, agrees substantially with the general statements of appellant and intervenor-appellant, concerning the role of a court in passing on the constitutionality of a statute, to the effect that a court will, if possible, adopt a construction of a statute which will uphold its constitutionality. It should also be pointed out, however, that a statute is either constitutional or unconstitutional by reason of its scope, purpose and effect and is to be tested by realistic consideration of the subject which it encompasses, the purpose which it seeks to serve and the effect it has when put into operation. Accordingly, a court will not amend a statute by construction in order to make it constitutional. *Scales* v. *United States,* 367 U.S. 203, 6 L. Ed. 2d 782, 81 S. Ct. 1469; *State ex rel Edwards* v. *Osbourne,* 195 S. C. 295, 11 S.E. 2d 260 (1940).

It should also be pointed out that the statute in question here is a criminal statute which may subject a party convicted of its violation to both a fine and imprisonment. The courts will carefully scrutinize any such statute when attacked on the grounds that the statute is vague and ambiguous or where it fringes upon a basic constitutional right. As stated by Justice Crockett in the case of *State* v. *Packard*, 122 Utah 369, 250 P.2d 561 (1952), even where a statute is enacted for a proper purpose "great caution must be observed in permitting encroachments upon basic rights, assured by the constitution, and such restrictions can be effected only in accordance with constitutional prerogatives and where clearly expressed standards are set up. . . . where a rule is set up, the violation of which subjects one to criminal punishment, the restrictions upon conduct should be described with sufficient certainty, so that persons with ordinary intelligence, desiring to obey the law, may know how to govern themselves in conformity with it, and that no one should be compelled at the peril of life, liberty or property, to speculate as to the meaning of penal statutes." (See also *City of Price* v. *Jaynes*, 113 Utah 89, 191 P.2d 606 (1948); *State* v. *Musser*, 118 Utah 537, 223 P.2d 193 (1950); *U.S.* v. *L. Kohen Grocery Co.*, 255 U.S. 81, 41 S. Ct. 298, 65 L. Ed. 516.

Numerous cases from other jurisdictions, both sustaining and declaring unconstitutional the Unfair Practices Acts of other states are annotated in 118 A.L.R. 506 and 128 A.L.R. 1126. No hard, fast rules can be derived from the conflicting decisions of other courts concerning the constitutionality of this type of statute. Much of the conflict is due to the fact that the statutes them-

selves vary widely in regard to what is prohibited, the presumptions created, the uniformity of the application of the statutes in question, etc. An examination of the cases can, however,, illustrate why some courts have struck down the Unfair Practices Acts of their own states and provisions which Unfair Practices Acts must or must not contain in order to avoid vulnerability to constitutional attack. The Utah Legislature can be credited with incorporating into the Utah Act most of the provisions which have caused courts of other jurisdictions to declare the acts of their states unconstitutional.

POINT I.

THE ACT IS UNCONSTITUTIONAL AS BEING AN ARBITRARY AND UNREASONABLE EXERCISE OF THE POLICE POWER

Since the decision of the United States Supreme Court in the case of *Nebbia* v. *New York,* 291 U.S. 502, 54 S. Ct. 505, 78 L. Ed. 940 (1934) it has generally been held that Unfair Practices Acts are within the domain of the state's police power and can be enacted by state legislatures. Such acts, however, are unconstitutional if "arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt, and hence an unnecessary and unwarranted interference with individual liberty." The Supreme Court in the *Nebbia* case held that the right of state legislatures to enact such legislation is conditioned by the due process clause and that the Fourteenth Amendment requires "that the end shall be accomplished by methods consistent with due process." The guarantee of due process demands "that

the law shall not be unreasonable, arbitrary or capricious and that the mean selected shall have a real and substantial relation to the object sought to be obtained." The Utah Act runs afoul of this basic requirement.

Utah's Unfair Practices Act as it existed prior to 1965, provided in part:

> 13-5-7. Sales, less than cost. — (a) It is hereby declared that any advertising, offer to sell or sale of any merchandise, either by retailers or wholesalers, at less than cost as defined in this act with the intent and purpose of inducing the purchase of other merchandise or of unfairly diverting trade from a competitor or otherwise injuring a competitor, impairs and prevents fair competition, injures public welfare, is unfair competition contrary to public policy and the policy of this act and is declared to be a violation of this act, where the result of such advertising, offer or sale is to tend to deceive any purchaser or prospective purchaser, or to substantially lessen competition, or to unreasonably restrain trade, or to tend to create a monopoly in any line of commerce."

In 1965, the statute was amended so as to delete the clause, "where the result of such advertising, offer, or sale is to tend to deceive any purchaser or prospective purchaser, or to substantially lessen competition, or to unreasonably restrain trade, or to tend to create a monopoly in any line of commerce." As the statute now reads, it is a violation of the act to make a sale below cost as defined by the act regardless of whether or not any public injury results if the sale is made with the intent "of inducing the purchase of other merchandise or of

unfairly diverting trade from a competitor or otherwise injuring a competitor."

Most courts which have considered the question have held that in order for the statute to be constitutional it must only prohibit sales below cost which are made with an evil intent, or which accomplish an evil result. E. g. *Kansas* v. *Fleming Co.,* 184 Kansas 674, 339 P.2d 12 (1959); *Englebrecht* v. *Day,* 201 Okla. 585, 208 P.2d 538 (1949). As stated by the Colorado Supreme Court in the case of *Perkins* v. *King Soopers, Inc.,* 122 Colo. 263, 221 P.2d 343 (1950):

> Our study of the decided cases leads to the conclusion that a statute attempting to prohibit all sales below cost would be unconstitutional, and to avoid this result only such sales may be prohibited which are intended to injure the public in a manner warranting the exercise of the police power.

The Utah Act as it presently exists can subject a defendant to criminal punishment for making a sale with the sole purpose of inducing a customer to purchase other merchandise, although such act neither misleads a purchaser, injures a competitor, tends to create a monopoly, restrains trade or lessens competition, and although the seller intended none of these results. There is no requirement in the Utah Statute for the existence of an intent to injure the public in any manner and no such result need be accomplished in order to make the seller guilty. At least this is the contention of appellant in charging the defendant Skaggs in Count V of the complaint with a violation for selling a brand of vitamins

below cost where it was stipulated that no competitor of Skaggs had such vitamins available for sale. Skaggs admits that it priced the vitamins below invoice cost plus the statutory 6% markup in hopes that purchasers might buy other merchandise in addition to vitamins when they came into the store. The court below properly held such a prohibition to be unconstitutional. Such a prohibition against something which is not in itself evil, does not tend toward something evil and which is not done with an evil purpose is beyond the authority of the Legislature and is unconstitutional. Pennsylvania's Supreme Court in striking down the Unfair Practices Act of that state for the statute's failure to provide an illegal intent stated in *Commonwealth* v. *Zasloff*, 338 Pa. 457, 13 A.2d 67, 70; (1940):

> Price cutting in itself is not an evil; on the contrary, the more intense the competition, the greater the likely advantage to the purchasing public. Indeed there is no reason why a merchant should not make an absolute gift of merchandise to his customers if he desires to be benevolent or thereby advertise his business. There are many other conceivable and wholly proper reasons which might induce him to make sales without profit, as, for example, a necessity of paying importunate creditors. It is only when the object of price cutting is sinister — to destroy a competitor by suffering a temporary loss in order to gain an ultimate monopoly (Mogle's Steamship Co., Ltd. v. McGregor, Gow & Company, 23 Q. B. 598), or to defraud the public by seducing them into the purchase of other goods at an exorbitant price — that the selling of goods at less than cost may constitute an economic or social evil. The Pennsylvania Act, therefore, is arbitrary, and the

means which it employs are grossly out of proportion to the object which it seeks to attain.

In order for a statute to constitutionally restrict a person's right to advertise and sell his goods, a danger to the public health, welfare or morals must exist and the statute must have a substantial and reasonable relationship to the correction or elimination of that danger. The Utah Supreme Court in the case of *Pride Oil Company* v. *Salt Lake County,* 13 Utah 2nd 183, 370 P.2d 355 (1962) stated that one of the basic tenets of our system is that free and open competition is a wholesome, stimulating force in our economy. The court in striking down a statute which restricted service stations in advertising the price of gasoline, stated:

> The attack upon the statutes is based upon the ground that they are an invasion of the right to own and enjoy property. We have recognized that this includes the right to sell it; and to let others know of the desire to do so and the price.
>
> The validity of appellant's contention that these rights are not absolute is acknowledged. One who desires to assert them and have them enforced by public authority must do so in an awareness that when in the judgment of the legislature it appears to be necessary for the protection of some more important interest of the public which involves safeguarding its health, morals, safety or welfare, even those basic personal rights may be limited to the extent necessary to so protect the public interest.
>
> But a pivotal consideration in the problem before us is that in order to justify encroachment on these rights, such a danger to the public must exist and the statute must be such that it will have some substantial and reasonable relationship to the elimination or correction of the evil.

The Utah Unfair Practices Act makes it a crime for a merchant to sell his merchandise for a sum below that which is defined as cost by the act, regardless of whether such sale misleads a purchaser, injures a competitor or restrains trade and regardless of whether the seller intended any of these results. It is difficult to see how this act comes within the purview of constitutionality permissible legislation as laid down by this court in the *Pride Oil Company* case.

POINT II

THE UTAH UNFAIR PRACTICES ACT IS UNCONSTITUTIONALLY VAGUE AND AMBIGUOUS

An Unfair Practices Act which provides criminal sanctions for its violation must not be vague or ambiguous in order to avoid offending the due process clauses of both the federal and state constitutions. E.g. *State* v. *Walgreen Drug Co.*, 57 Ariz. 308, 113 P.2d 650 (1941); *Daniel Loughran Co.* v. *Lord Baltimore Candy and Tobacco Co.*, 178 Md. 38, 12 A.2d 201 (1940); *Avella* v. *Almac's, Inc.*, (R. I. 1965), 211 A.2d 665; *State* v. *Wender*, 149 W. Va., 413, 141 S.E. 2d 359 (1965). As stated by the Utah Supreme Court in the case of *State* v. *Packard*, Supra:

> The limitations of language are such that neither absolute exactitude of expression nor complete precision of meaning are to be expected, and such standard cannot be required. On the other hand there is no disagreement among the courts that where a rule is set up, the violation of which subjects one to criminal punishment, the restric-

> tions upon conduct should be described with sufficient certainty, so that persons of ordinary intelligence, desiring to obey the law, may know how to govern themselves in conforming with it, and that no one should be compelled at the peril of life, liberty or property to speculate as to the meaning of penal statutes. . . .
>
> Concerning the question of uncertainty or vagueness of statutes the auhority seemed to be in accord that the test of statute must meet to be valid is: It must be sufficiently definite (a) to inform persons of ordinary intelligence, who would be law abiding, what their conduct must be to conform to its requirements; (b) to advise a defendant accused of violating it just what constitutes the offense with which he is charged; and (c) to be susceptible of uniform interpretation and application by those charged with responsibility of applying and enforcing it.

See also *Connally* v. *General Construction Co.*, 269 U.S. 385, 46 S.Ct. 126, 70 L. Ed. 322 (1926); *City of Price* v. *Jaynes,* 113 Utah 89, 191 P.2d 606 (1948); *State* v. *Musser,* Supra; *Musser* v. *State,* 333 U.S. 95, 68 S. Ct. 397, 92 L. Ed. 562 (1948).

The cost below which a retailer may not sell his goods is defined by the act in Section 13-5-7 (b)3, as follows:

> 3. When used in this act, the term "cost to the retailer shall mean the invoice cost of the merchandise to the retailer within 30 days prior to the date of sale, or the date of offering for sale, or the replacement cost of the merchandise to the retailer, whichever is lower; less all trade discounts except customary discounts for cash; to which shall be added: (a) freight charges not oth-

erwise included in the invoice cost or the replacement cost of the merchandise as herein set forth, and (b) cartage to the retail outlet if done or paid for by the retailer, which cartage cost in the absence of proof of a lesser cost, shall be deemed to be ¾ths of 1% of the cost to the retailer as herein defined after adding thereto freight charges but before adding thereto cartage and mark-up, and a mark-up to cover a proportionate part of the cost of doing business, which mark-up in the absence of proof of a lesser cost, shall be 6% of the cost to the retailer as herein set forth after adding thereto freight charges and cartage but before adding thereto a mark-up."

The act ostensibly gives to the merchant the right to sell his goods for the invoice price of the goods, less all trade discounts except "customary discounts for cash" plus freight charges plus "a proportionate part of the cost of doing business." The act condemned by the court in the case of *Balzer* v. *Caler,* 74 P.2d 839 (Cal. App. 1937), affirmed 82 P.2d 19, also contained a provision providing that the retailer, in order to avoid violation of the statute, must add to the cost of his goods, "a mark-up to cover a proportionate part of the cost of doing business." The problems which a retailer faces in complying with this statute was pointed out by the court in the *Balzer* case as follows:

> According to the language of the statute, the aggregate of all these various items must be added to the invoice or replacement costs of a particular article which the vendor desires to sell to determine the price below which he is precluded from disposing of the goods. A bare statement of the asserted rules demonstrates this absurdity. It is not the proportion of the overhead expenses

which the value of the article for sale bears to the value of the entire stock of goods which is to be added to the invoice price of the article, but all cost incurred in the conduct of such business are to be added thereto. Moreover, the statute fails to state what period of time is to be included in estimating overhead expenses which are to be added to the invoice price of the article to be sold so as to determine the cost for resale thereof. A merchant's stock in trade varies from time to time. Meats, bakery products and certain classes of groceries deteriorate rapidly. Is the merchant to take stock and hold an accounting every time he wishes to display for sale a few leader articles below normal price for the purpose of advertisement? For the purpose of such sales is he to estimate his average overhead expense for the period of the year, or for a month, or is he to ascertain that sum on the very day on which he proposes to sell the forbidden article? By what standards is a merchant to determine such elements as depreciation of the goods, selling cost, or credit losses? What is to be the measure of the value of his equipment? Is there to be no limit of expenditures for interest, insurance, or advertising? The statute throws no light upon these perplexing problems. Every merchant is left to guess the rules and standards to be applied and to determine for himself the period for which the overhead expenses are to be calculated. The section is therefore uncertain and invalid in that regard.

In this case, Skaggs was found by the court to have sold "Bayer Aspirin" at a price in excess of the invoice cost of the aspirin but below "cost" as defined by the act. In order to avoid violating the law, Skaggs would be required to add to each bottle of aspirin sold a propor-

tionate cost of doing business. How would the cost of rental, depreciation, real estate taxes, be applied to the sales price of a bottle of "Bayer Aspirin"? Should the bottle of apsirin be required to bear its proportionate share of these costs based upon the percentage of space which the bottle occupies in the store? Should this resulting figure then be modified so as to take into account the length of time the bottle occupied that space as compared with the average length of time which other items in the store occupied space? What about the cost of fire insurance premiums? Is the bottle of "Bayer Aspirin" to bear the same proportionate cost of these premiums as are more flammable materials? What proportion of the salaries of the employees of the store are to be attributed to the bottle of "Bayer Aspirin"? Would it be based upon the amount of time it takes a checker to sell a bottle of aspirin to a customer? If so, how is the average length of time it takes a checker to sell a bottle of "Bayer Aspirin" to be determined? All of the above questions must be answered by the retailer before he can attribute to a particular item its proportionate part of the cost of doing business. It is questionable that this statute "informs persons of ordinary intelligence, who would be law abiding, what their conduct must be to conform to its requirements." A retailer's only alternative is to add to the invoice cost of the goods a 6% mark-up. Such an alternative was given to the defendant in the case of *State* v. *Wender,* Supra. The statute in this case referred to "cost of doing business," and the court in holding the act to be unconstitutional found this phrase incomprehensible. Since the retailer could not comply with it, he was re-

quired to rely on the regulations imposed by the statute. This was held to be no alternative.

In actual practice the modern retailer may not know what the actual price of his goods are to which he is required to add the 6%, until long after the sale of that item has taken place. The testimony of Mr. Edwin N. Austin, Jr., in this case concerning this matter is as follows:

> Q. There are however other discounts that are unknown at the time the goods are received in the store, isn't that correct?
>
> A. Yes.
>
> Q. Would you describe some of these discounts that you are familiar with?
>
> A. Well, you have some products that you buy over a period of time you receive free goods, depending upon the quantity as you buy. These are in items and categories that you have no knowledge of what those free goods would be. When you receive them it is almost like a gift. You don't know how much you have earned, or how much you have coming until they come around in the quota, and send you these free gifts. I am talking about like items or appliances at the end of a quota or any given period, they will send you some free goods to rebate you for, perhaps over this period. There are other items you get a rebate on volume, depending upon what your volume is, and this rebate increases as your volume goes up, and it could vary, as an example from 5% to 10%, depending on where the level will be when you finish the season. I am talking about an item like garden hose. You have no idea how much garden hose you are going to sell in a given season, but as you reach these different levels you

> get different rebates and you have no way of knowing what these will be. So we never enter these on our cost when we are cost marking our merchandise. (R. 90-91)

The definition of the price below which a seller may not sell his merchandise without violating the act is further complicated by the fact that the merchant is to deduct from his invoice cost "all trade discounts except customary discounts for cash." Nowhere in the act is there a definition as to what is meant by "customary discounts for cash." It evidently does not apply to all cash discounts since only "customary cash discounts" are to be subtracted from the trade discounts which reduce the inventory price. Customary to whom? A cash discount which is customarily given to this particular merchant, or a discount which is customarily given in the trade, whether or not this particular merchant ordinarily receives such a discount? The merchant must interpret the statute for himself and arrive at its meaning at his peril. The definition of cost as contained in the Unfair Practices Act is too vague and ambiguous to apprise a party as to what he may or may not do without violating the act.

The ambiguity in the definition of "cost" is only one of the ambiguities which permeates the act. The act prohibits certain sales done "with the intent and purpose of inducing the purchase of other merchandise, *or of unfairly diverting trade from a competitor or otherwise injuring a competitor.*" The act nowhere indicates what is meant by "unfairly diverting trade from a competitor." If a merchant advertises goods below cost in

order to reduce his inventory as was done in connection with the charge set forth in Counts VII and VIII of the complaint, is this unfairly diverting trade from a competitor? If he sells an item below cost in order to introduce people to a new store, as was done in connection with the charge set forth in Count VI of the complaint, is this unfairly diverting trade from a competitor? The merchant must guess as to when he is "unfairly" as distinguished from fairly diverting trade from a competitor. His guesses are at his peril since there are no guidelines whatsoever in the statute as to what might constitute an unfair diversion of trade from a competitor. If he fairly diverts trade from a competitor but that competitor is thereby injured by the loss of business, has he "otherwise injured a competitor" so as to be in violation of the act? In *Musser* v. *State, supra,* the phrase "to commit any act injurious . . . to public morals" was held to be unconstitutional for vagueness. In *State* v. *Packard, supra,* this court held the term "nationally recognized union" was held too vague and indefinite to meet constitutional standards. If the above terms are too vague and indefinite it is difficult to see how phrases like "unfairly diverting trade from a competitor" or "otherwise injuring a competitor" can stand the constitutional test of informing a party what he may or may not do.

The act is also vague and ambiguous insofar as Section 13-5-12 (d) of the act is concerned. This section exempts from the prohibitions of the act sales made:

> (d) In an endeavor made in good faith to meet the legal prices of a competitor as herein defined selling the same article, product, or commodity in the same locality or trade area.

To begin with the "legal prices of a competitor" are nowhere defined in the act. But assuming that such definition were given, this provision would still be too ambiguous to apprise the seller of what he could or what he could not do. An identical provision of the New Jersey Unfair Practices Act was struck down in the case of *State* v. *Packard-Bamberger & Company,* 123 N.J. 180, 8 A.2d 291 (1939). The court stated:

> How a person is to determine the legality of the price of a competitor is not declared, and the impracticality, if not impossibility, of determining the "legality" of a competitor's price is obvious.

The Pennsylvania Supreme Court in striking down the Pennsylvania Unfair Practices Act on the grounds that it was so vague, indefinite and incapable of practical application as to make its enforcement a violation of due process stated in the case of *Commonwealth* v. *Zasloff,* supra, "how could a merchant know whether a selling price which he proposed to fix was legal because it met the 'legal price of a competitor for merchandise of the same grade, quantity and quality?' How could such a legal price of a competitor be ascertained without examining the competitor's books in order to determine whether his price was legal?"

Furthermore, the exemption applies only to sales to meet a competitor "in the same locality or trade area." Is a small grocery store on the avenues in the same "locality or trade area" as a large grocery on 39th South? Is Skaggs' store in Bountiful "in the same locality or trade area" as Grand Central's store on 9th

South in Salt Lake City? In the case of *State* v. *Standard Oil Co. of New Jersey,* 195 So. Car. 267, 10 S.E.2d 778 (1940) the court condemned the use of the words "locality", "community", "section", "section of a locality" as used in a statute prohibiting locality price discrimination.

POINT III

THE UTAH UNFAIR PRACTICES ACT IS UNCONSTITUTIONAL IN ITS UNJUSTIFIABLE DISCRIMINATION BETWEEN PARTIES SIMILARLY SITUATED

A statute which differentiates between different classes without a reasonable basis for the differentiation, or which has the effect of giving different treatment to persons similarly situated is unconstitutional. As stated by the Utah Supreme Court in the case of *State* v. *Packard, supra*:

> Statutes may deal different classes differently, if all within the same class are treated uniformly, and so long as there is some reasonable basis for differentiation between classes related to the purpose of the statute. State v. Mason, 94 Utah 501, 78 P. 2d 920, 117 A.L.R. 330; State v. J. V. & R. E. Walker, Inc., 100 Utah 523, 116 P. 2d 766. Conversely, a statute is unconstitutional as being unreasonably discriminatory if it differentiates between such classes without any reasonable basis bearing on the purpose sought to be accomplished by the statute. Gronlund v. Salt Lake City, 113 Utah 284, 194 P.2d 464; Slater v. Salt Lake City, 115 Utah 476, 206 P.2d 153, 9 A.L.R. 2d 712.

A number of cases have held Unfair Practices Acts unconstitutional because of exemptions granted to cer-

tain persons under the act and because of discrimination between persons similarly situated. E.g. *Kansas* v. *Consumers Warehouse Market, Inc.*, 185 Kansas 363, 343 P.2d 234 (1959); *Wayne's Distributors, Inc.*, v. *Tilton*, 7 N. J. 349, 81 A.2d 786 (1951); *Serrer* v. *Cigarette Service Co.*, 148 Ohio St. 519, 76 N.E.2d 91 (1947). Such discriminations in regard to persons exempted from the act violate the equal protection and due process clauses of both the federal and state constitutions. An act is unconstitutional if it exempts from its provisions classes of persons similarly situated to those not exempted in regard to the purposes of the act. *Gronlund* v. *Salt Lake City*, 113 Utah 284, 194 P.2d 464 (1948); *Broadbent* v. *Gibson*, 105 Utah 55, 140 P.2d 939 (1943).

The Utah Unfair Practices Act creates just such discrimination. The ordinary retailer is prohibited from selling below cost except where he endeavors "to meet the legal price of a competitor." A manufacturer or producer, on the other hand, selling exactly the same item is not so confined. His sales below cost are exempted under Section 13-5-12 (e) simply by meeting "prices established in interstate competition regardless of cost." Such a manufacturer or producer is not limited to meeting "the legal price of a competitor." Thus, a large manufacturing and retailing organization can sell its goods in Utah by simply meeting the low prices established in some other state even though that low price is an "illegal price." The small merchant who is not a producer or manufacturer cannot even legally sell at a low price to meet his competitor's prices unless that price is "legal." While the legislative body has a wide

discretion in classifying the types of persons or activities which come within the purview of a statute, such classification is unconstitutional when the basis upon which it is founded is unreasonable. There must be a reasonable basis for the differentiation between the class which is made subject to the regulation and the class which is not subject to it, which basis must bear a reasonable relation to the purposes to be accomplished by the act. *Slater* v. *Salt Lake City,* 115 Utah 476, 206 P.2d 153 (1949); *Wallberg* v. *Utah Public Welfare Commission,* 115 Utah 242, 203 P.2d 935 (1949).

The different exemptions granted to a manufacturer or producer on the one hand and the ordinary small retail merchant on the other hand is not only unreasonable in view of the purpose of the act, but it frustrates the avowed purpose of the act to promote competition. Section 13-5-17 of the Utah Unfair Practices Act provides as follows:

> The legislature declared that the purpose of this act is to safeguard the public against the creation or perpetuation of monopolies and to foster and encourage competition, by prohibiting unfair and discriminatory practices by which fair and honest competition is destroyed or prevented. This act shall be liberally construed that its beneficial purposes may be subserved.

The broad exemption given to the manufacturer-retailer by the act, which is denied to the ordinary retail merchant, gives the competitive advantage to the large manufacturer-retailer in violation of the avowed purpose of the act.

The act also discriminates, without reason or justification, between retailers who receive cash discounts on the purchase of merchandise and those who receive trade discounts. In determining the minimum price at which a retailer may sell his goods the statute permits a retailer who receives a trade discount to deduct the trade discount from the invoice price. The retailer who receives a customary cash discount may not deduct this discount from his invoice price and will thus be required to sell his goods at a higher price than his competitor who receives a trade discount, to avoid violating the law. This is in spite of the fact that the net costs of the items to the retailers is identical. What possible reason there can be for this distinction is unfathomable. As stated by the Utah Supreme Court in *Slater* v. *Salt Lake City, supra,* "If there is a reason for such classification it is obscure and appears to us to be more fanciful than real." The act in treating retailers differently without reason is unconstitutional and cannot be upheld. As this court held in *Slater* v. *Salt Lake City, supra,* "If we are unable to find any reasonable basis for the classification, then we cannot sustain the enactment."

In actual application the act does not treat equally persons similarly situated. The act purports to prohibit sales below cost. The statute purportedly permits a retailer to take his invoice price for the goods, deduct from that price "all trade discounts, except customary discounts for cash," and add to this sum the cost of freight and cartage plus "a mark-up to cover a proportionate part of the cost of doing business, which mark-up, in the absence of proof of a lesser cost shall be 6%

of the cost to the retailer." The resulting figure is the figure below which the retailer may not sell his merchandise. As pointed out in POINT II, above, the retailer cannot possibly add to the invoice cost "a proportionate part of the cost of doing business." Such a proportionate part is impossible to ascertain. He is thus forced to add 6% of the cost as a mark-up. This is presumed to be his cost of doing business and the price below which he is prevented from selling his merchandise.

This formula unjustly discriminates between merchants carrying on different types of operations. As an example, the retailer who operates on a cash and carry basis has less operating expense than the retailer who operates on a credit and delivery basis simply because the former has no collection or delivery expense. Yet if both merchants purchase their goods from the same source and thereby have the same invoice cost and receive the same discounts, the former is unjustly discriminated against insofar as the price at which he must sell is concerned. The cash and carry merchant is prohibited from selling his merchandise for less than the credit and delivery merchant, even though his cost of doing business is less. While the purported purpose of the statute is to prevent retailers from selling below cost, in actual practice the statute operates to set the price of both merchants regardless of the merchant's actual cost of doing business to the detriment of the merchant having the lower operating costs. Such discrimination was condemned in the case of *Serrer* v. *Cigarette Service Co., supra.* The court stated that although legislative bodies may, in the exercise of the police power prohibit sales at

below cost, legislation enacted to accomplish this object must be so phrased as to recognize economies and practices whereby one seller can sell particular merchandise at a lower price than a competitor and still not be charged with selling below actual cost.

The Utah Unfair Practices Act, in giving extensive exemption to manufacturer-retailers, which are not available to the ordinary retailer, in discriminating without reason between the retailer who receives a trade discount and one who receives a cash discount, and in failing to provide for equal treatment of retailers having differing overhead operations, is violative of the due process and equal protection provisions of the federal and Utah constitutions.

POINT IV

THE UTAH UNFAIR PRACTICES ACT IS UNCONSTITUTIONAL DUE TO PRESUMPTIONS WHICH SHIFT THE BURDEN OF PROOF TO THE DEFENDANT AND WHICH UNREASONABLY ASSUME PROHIBITED ELEMENTS OF THE CRIME TO EXIST FROM FACTS HAVING NO REASONABLE RELATION THERETO

While it is generally recognized that the legislature has the authority to create presumptions from proven facts, such authority is limited by the due process clauses of both state and federal constitutions. The due process clause requires that in a criminal statute the presumption cannot be conclusive, and the fact presumed must be fairly inferred from the fact proved. *Adler* v. *Board of Education,* 342 U.S. 485, 72 S. Ct. 380, 96 L. Ed. 517

(1952); *Great Atlantic and Pacific Tea Co.* v. *Ervin*, 23 F. Supp. 70 (D. Minn. 1938).

The Utah Unfair Practices Act is replete with illegal presumptions whict do not meet these basic constitutional requirements. Perhaps the most unconstitutional of such presumptions is the provision of 13-5-7 which states that the "cost to the retailer" shall mean the invoice or replacement cost within 30 days of the date of sale, less trade discounts, plus a 6% mark-up to represent the "proportionate part of the cost of doing business." The 6% mark-up is an arbitrary mark-up which is stated to be the presumed cost of doing business of every seller, "in the absence of proof of a lesser cost." A statutory presumption in a criminal statute in order to be constitutional cannot be a conclusive presumption. *Adler* v. *Board of Education, supra.* A conclusive presumption of the Colorado Unfair Practices Act was struck down by the Colorado Supreme Court in *Perkins* v. *King Soopers, Inc., supra,* in which the court stated:

> The legislative right to declare that the proof of one fact shall be presumptive or prima facie evidence of another is no longer open to serious dispute in this jurisdiction, or elsewhere. [Citing cases] It may also be said in the light of the foregoing authorities that the power vested in the legislature to create such presumptions is subject to the qualification that there must be some rational connection or reasonable relation between the fact proved and the ultimate fact to be established; *also such power is subject to the further limitation that the presumption cannot be made a conclusive one.*

(emphasis is that of the Colorado Supreme Court.)

While the language of the Utah Act indicates that the presumption of the 6% mark-up is not conclusive, the presumption is in fact conclusive and any language in the act to the contrary is illusory. As pointed out in POINT II, above, it is impossible for a retailer selling hundreds of items of merchandise to allocate to any particular item a proportionate part of his cost of doing business. The testimony of Dean Randall of the University of Utah College of Business demonstrates this impossibility. He pointed out that you can start with invoice cost but must take into consideration trade discounts or cash discounts and problems of allocating these to a particular item available for sale. There are freight costs which must likewise be allocated unless the shipment consists of only one product and the problem of whether the allocation should be made on the basis of weight or on some other basis. There are also purchasing costs to take into account, such as writing the orders, checking the orders and mailing and the time required of the person making the order. In regard to the latter, this becomes very difficult where the order clerk is purchasing thousands of items and in irregular volume. Storage must be allocated on an arbitrary basis and one of the factors to be considered is the time the particular article is stored and the space involved for storage. Transportation from the warehouse or storage area is an additional cost factor. Advertising costs can occasionally be allocated if, for example, nothing but Bayer Aspirin was advertised on a certain day for sale in a particular store, but where many products are sold and a large shopping area is involved the allocation of

cost of advertising to a particular item is "extremerly difficult." Dean Randall further testified that under both the Skaggs and Grand Central accounting systems, both of which he thought were proper accounting systems even though different, it would not be proper to allocate an accurate cost to a specific item. Finally Dean Randall concluded as follows:

> In my opinion in a retail store handling thousands of items it would be economically impossible to arrive at a realistic cost of selling each item. (R. 116)

Since it is impossible for any retailer to prove his "proportionate part of the cost of doing business" attributable to an item of merchandise, the arbitrary presumption that it is 6% of cost becomes a conclusive presumption. The creation of this conclusive presumption is unconstitutional.

This conclusive presumption with regard to cost, is fortified by an administrative presumption with regard to the intent factor. The executive secretary of the Trade Commission testified (R. 124) that the statutory requirement of intent to injure a competitor, etc., is taken for granted when he finds a sale below the "legal price." The result would be enforcement action and the burden thrown on the defendant to prove that he did not intend to injure a competitor and so forth.

The Utah Act also creates a presumption in 13-5-9(2) that proof of the limitation of the quantity to be sold to any one customer coupled with a showing that the product was sold below cost as defined by the act,

creates a presumption that the sale was made for the purpose of destroying competition or injuring a competitor. Count IV of plaintiff's complaint alleged that on or about June 20, 1966, the defendant Skaggs advertised Polaroid Swinger Cameras for sale at $13.49, which was less than cost as defined by the act and limited the purchase of the cameras to one (1) to a customer which was less than the entire supply owned or possessed by Skaggs. The plaintiff relied upon the presumption contained in 13-5-9 (2) to establish that the purpose of the sale was to destroy competition or otherwise injure a competitor. Except for this presumption the trial court found that there was insufficient evidence to justify a finding that Skaggs offered the item for sale for any purpose proscribed by the statute.

Such a presumption of illegal intent in an Unfair Practices Act has been struck down in several cases from other jurisdictions. E.g. *Motts Super Markets, Inc.* v. *Transinelli,* 148 Conn. 481, 172 A.2d 381 (1961); *W. M. Wiley* v. *Samson-Ripley Co.,* 151 Maine 400, 120 A.2d 289 (1956)); *Perkins* v. *King Soopers, Inc., supra.* In order for any presumption to be constitutional the fact presumed must be fairly inferred from the fact proven. *Tot* v. *United States,* 319 U.S. 463, 63 S. Ct. 1241, 87 L. Ed. 1519 (1943); *Adler* v. *Board of Education, supra.* The court in *Great Atlantic and Pacific Tea Co.* v. *Ervin, supra,* stated in holding the presumption provision of an Unfair Practices Act to be unconstitutional:

> It is apparent from this decision of the Supreme Court that in determining the validity of a presumption created by a legislative body, two

> questions are to be considered: (1) Whether the fact presumed may be fairly inferred from the fact proven: (2) Whether the presumption created will be of aid to the state without subjecting the accused to unreasonable hardship or oppression. With respect to the presumption created by the sixth paragraph of section 3 of part 2, we have already pointed out that in our opinion the fact of guilty intent is not reasonably to be inferred from the fact of sale at less than 10% above the cost of the goods. No doubt, the presumption of guilt would be helpful to the state in prosecution of alleged violators of the statute, but it would be as hurtful to the accused as it would be helpful to the accuser. Intent is something which is easily asserted and hard to disprove. To cast upon a merchant who has sold goods at less than 10% above the cost, the burden of establishing that the sale was not made with an intent to injure competitors or destroy competition, subjects him to unreasonable hardship. We think the disadvantage to him of the presumption of guilt should be regarded as outweighing the advantage of the presumption to the state.

The limitation on the quantity of items which a retailer permits one customer to purchase has no bearing whatsoever upon his intention in selling that particular item below cost as defined in the act. Mr. Edwin Austin, Supervisor of Skaggs' stores in the Salt Lake area, testified in this case that the reasons why a retailer limits the number of items which may be purchased by one customer are varied, none of which are the injury of a competitor or the lessening of competition. The number of items which could be purchased by one customer may be restricted due to the fact that the retailer has a limited

supply of that particular item and wishes to supply as many of his customers with the item as possible, or the number of items which one customer may purchase may be restricted to prevent a raid on the retailer's supply of that particular item by a competitor, or the retailer's supply of that particular item may be restricted by the supplier. The testimony of Mr. Austin in this connection is as follows (R. 88-90):

> Q. Now, with respect to Count V of the — excuse me, Count VI of the complaint, this relates to the sale of Polaroid Swinger Cameras at $13.49. At the time that was sold it is alleged and admitted that we limited the purchase of cameras to one per customer. Can you tell the Court why that limitation was imposed?
>
> A. Well, this was an opening in our new store over on Eighth West, and all openings, we like to give our customers something unusual, well, probably to give them some reason to come in and look at our new store. The reason that this Polaroid Camera was limited, Polaroid Cameras at that time were on allocation. We felt we had enough cameras in this particular market, this Eighth West Store, providing they did not come in and try to buy all of them up, two or three per bill.
>
> Another thing, in Polaroid Cameras we usually feel we are limited. We usually feel we do not give the customer 30 days' supply in a camera. No one customer needs more than one camera, and we felt we were justified in limiting it to one camera per family so we could supply all our customers in that area.
>
> Q. You used the term, the cameras were in allocation.

A. When Polaroid comes out with new models they will quite often allocate their supply and you are limited to so many in one store. All of Polaroid's accounts through the country would be allocated. Whatever you are set up for that store, that is all you could buy. You can't buy all you want of the Polaroid Cameras.

* * *

Q. (By Mr. Waldo) Referring back to the Swinger Camera now again, it is one item from time to time that in your general merchandising you find necessary to limit in quantity, is that correct?

A. Occasionally.

Q. Now, is it possible when you have made a particularly attractive price on an item for even one of your competitors to come in and buy large quantities of that item?

A. This sometimes happens.

Q. And so it is fair to say that at least on occasions a reason for limiting quantity is to protect from this kind of competitive raid?

A. Yes.

It is clear from the uncontradicted testimony of Mr. Austin and from a reasoned examination of the presumption that there exists no logical connection between the fact that the retailer has limited the number of items which can be purchased by one customer and the fact to be presumed therefrom, that the retailer has the intent to injure or destroy competition. The presumption is unconstitutional.

The Utah Act also creates what appears to be an irrebuttable presumption of the guilt of an officer or

agent of a corporation being prosecuted under the act by proof of "the unlawful intent of the person, firm or corporation for whom or for which he acts." This presumption is created by Section 13-5-11 of the act. Such a presumption is clearly a violation of the due process clauses of the state and federal constitutions. An identical provision of the Unfair Practices Act was held unconstitutional in *Great Atlantic and Pacific Tea Co.*, v. *Ervin, supra.* The court in that case stated:

> To visit the sins of the guilty upon the innocent, to impute a wrongful intent to those who have none, to make guilt depend upon a legislative fiat, ought not to be tolerated under our system of criminal jurisprudence.

The irrebuttable presumption as to what a retailer's proportionate cost of doing business is and the presumptions of illegal intent from the existence of facts not related thereto make the act violate the due process clauses of the federal and state constitutions and render the act unconstitutional.

POINT V.

THE UTAH UNFAIR PRACTICES ACT IS AN UNCONSTITUTIONAL PRICE FIXING STATUTE

Since, as pointed out above, it is impossible for a retailer to add to an item which he sells the proportionate part of the retailer's cost of doing business, the retailer is required to add to his invoice price a charge of 6%. This is the price below which he cannot legally sell his goods. His failure to make such a mark-up subjects

him to the penalties of the criminal law regardless of whether such act by the merchant tends to deceive a purchaser, lessens competition, unreasonably restrains trade or tends to create a monopoly. He is declared to be in violation of the act regardless of whether or not his intent in selling the goods at below the required mark-up was with the intent of accomplishing any of these effects. But the most sinister aspect of this price-fixing statute is that in many instances the 6% mark-up which a retailer is required to make is not related to the price at which he purchased his merchandise, but to the price at which his competitors may, at that time, purchase the same items. The statute specifically provides that if a retailer purchases merchandise and does not sell all of that merchandise within a period of 30 days it is not that retailer's invoice cost, but the replacement cost of the goods to which the 6% mark-up must be added. Thus, a merchant who makes an advantageous purchase of goods at a low price and who still has some or all of the goods on hand 30 days after his purchase cannot sell the goods to his customers at a reasonable mark-up which would have the effect of both furnishing him with a profit and passing part of the savings incurred through his advantageous purchase on to the consumer. In order to avoid violating the law, he must price his goods for an amount which will, in effect, not be below the price at which his competitors can then purchase the goods at the higher invoice price and then sell them at a 6% mark-up.

If legislative price fixing of this sort can be justified, and of course, we contend it can never be justified, it is certainly not justified in order to protect the "small"

merchant from the "large" merchant as appellants would have the court believe. In this day of cooperative buying through large organizations such as Associated Grocers, both small and large are able to compete with one another on much the same basis. Appellant's own witness, Mr. Sorenson, testified they could buy as well as any of the chain stores (R. 147-148). Competition is the life-blood of trade and freedom in fixing prices is fundamental to free competition.

This same type of statute was held to be unconstitutional by the West Virginia Supreme Court in the case of *State* v. *Wender, supra.* The statute in question in that case required the defendant to make computations concerning "cost of doing business." The court found this as well as other provisions to be incomprehensible and, since the retailer could not understand it, he was required to rely upon the regulations imposed by the statute. This amounted to price fixing and was held by the court to be unconstitutional.

The Utah Supreme Court has always carefully scrutinized legislation which smacks of price fixing and if price fixing is found has condemned the statute or activity as being in violation of Article XII, Section 20 of the Utah Constitution. Thus, in *Gammon* v. *Federated Milk Producers Association, Inc.,* 11 U. 2d 421, 360 P.2d 1018 (1961) the Utah Supreme Court struck down as unconstitutional price fixing, a contract entered into by a cooperative under the Uniform Agricultural Cooperative Act, which set minimum prices for the sale of milk. In *General Electric Company* v. *Thrifty Sales,* 5 U.2d

326, 301 P.2d 741 (1956) the Utah Supreme Court declared the Utah Fair Trade Act unconstitutional as a price fixing statute. In the course of the opinion, Justice Crockett made the following observations which apply just as strongly to the Unfair Practices Act.

> Regardless of whatever forms or rituals are gone through to accomplish the purpose of establishing retailers prices, or of any conjecture about the purpose of the legislation, the indisputable fact is that insofar as the non-signing merchant and the public are concerned, the act so operates that the agreement of the manufacturer and one dealer does establish the price at which the manufacturer's product must be sold by all retailers within the area. Therefore, in its basic essence, it must be regarded as "price fixing" and for that reason the act is invalid under Section 20, Article XII of our Constitution.

In *Pride Oil Company* v. *Salt Lake County,* 13 U.2d 183, 370 P.2d 355 (1962), this court declared unconstitutional a statute which regulated the posting of gasoline prices by service stations. The ostensible purpose of the statute was to protect the public by preventing false and misleading advertising. The court had no difficulty in seeing through the avowed purpose of the statute to its real purpose, however, which was the control of gasoline prices and the elimination of gas wars, and the entire statute was declared unconstitutional.

In *Revne* v. *Trade Commission,* 113 Utah 155, 192 P.2d 563 (1948) this court declared the Barbers' Price and Hour Act to be unconstitutional. The stated purpose of the act was to protect the public by establishing

minimum standards for barber shops. In effect, the act established minimum prices. The language of Justice Latimer's concurring opinion at page 575 is apropos in this case:

> It is most difficult to believe the intent of this act is to protect the health and welfare of the public. This has already been protected. When the mask is cast aside, we see the familiar act, which is claimed to be altruistic in principle, but is nothing more than a legislative permit to increase the cost of the service to the public. It substitutes the will of the profession for the will of the legislature and stifles individual initiative and energy when it is unnecessary to do so to protect the public good. It may increase the income of some of the individual shop owners, but this has no reasonable relationship to the public health and welfare.

The appellants contend that the Utah Unfair Practices Act is not a price-fixing statute since it merely establishes minimum prices. This argument was laid to rest in *Gammon* v. *Federated Milk Producers Association, Inc., supra.* That was all the contract involved in that case did. The Utah Supreme Court in declaring the contract unconstitutional held, however,

> Upon the basis of the record presented here it appears that the defendant acting under the provisions of the agreement with its members has engaged in fixing the minimum price for which milk was sold to distributors and processors, and in doing so its conduct has come within the prohibitions of Article XII, Section 20 of our Constitution.

POINT VI.

THE GIVING AWAY OF AN ITEM OF MERCHANDISE IN CONNECTION WITH A SALE IS NOT PROHIBITED BY THE UTAH UNFAIR PRACTICES ACT

The lower court found in connection with Count III of plaintiff's complaint that on June 20, 1966, Skaggs advertised cartons of cigarettes for $2.73 and gave a cigarette lighter away free with each purchase of a carton, which cigarette lighter cost Skaggs 25¢ each. The sale of the carton of cigarettes alone was not a sale below cost as defined by the act, but the combined articles, cigarettes and lighter, if taken together and considered a single sale, was a sale below cost as defined by the act. (R. 39) The court concluded that the sale by Skaggs of cigarettes and the gift of a cigarette lighter with a carton of cigarettes did not violate the act because the sale of the cigarettes alone was not a sale below cost as defined by the act and the gift of the cigarette lighter was not prohibited by the act. (R. 46)

Prior to the 1965 amendment of the act the first sentence of Section 13-5-9 of the act read as follows:

> For the purpose of preventing evasion of the provisions of this act in all sales involving more than one item or commodity *and in all sales involving the giving of any concession of any kind whatsoever (whether it be coupons or otherwise)* the vendor's or distributor's selling price shall not be below the cost of all articles, products, commodities, *and concessions* included in such transactions.

The emphasized portions of the act which precluded the giving away of items were deleted by the 1965 legislature, and the act as it now reads does not prohibit give-aways. In each of the following cases the courts have held that Unfair Practices Acts do not prohibit the giving away of items in connection with sales unless the act in question specifically prohibits such action. *State Ex Ins. Heath* v. *Tanker Gas, Inc.*, 250 Wis. 218, 26 N.W.2d 647 (1947); *United Retail Grocers Association* v. *Harrison & Sons, Inc.*, 89 Pa. D & C 294 (1954); *State of Minnesota* v. *Applebaums Food Market, Inc.*, 259 Minn. 209, 106 N.W. 2d 896 (1960).

CONCLUSION

The Utah Unfair Practices Act is an arbitrary and unreasonable exercise of the police power, which is so unconstitutionally vague that those subject to its provisions cannot determine what they may or may not do in order to avoid committing a crime. It is an act which unjustifiably discriminates between persons similarly situated and improperly creates presumptions of guilt and is, in effect, nothing more than a price-fixing statute. The retailer subject to the act is victimized for his foresight in making early, advantageous purchases of his merchandise, by being required to sell his goods at a price in excess of 6% of the price at which his less astute competitor can then purchase the same merchandise. His failure to do so subjects him to criminal punishment based upon irrebuttable and illogical presumptions of guilt. The ambiguities which permeate the statute re-

quire him to constantly guess as to what he may or may not do in setting his prices, even when all he is attempting to do is to meet the prices of his competitors.

Yet, penalized as he is by this legislation, the retailer is not the principal victim. The one who actually pays the price for this price-fixing statute is the consumer. It is he who pays the higher prices for merchandise because of the act's stifling of competition in the retail market.

Respectfully submitted,

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